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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93434; File No. SR-NYSEArca-2021-65]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to List and Trade Shares of the Sprott ESG Gold ETF under NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares)

October 27, 2021.

I. Introduction

On July 19, 2021, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the Sprott ESG Gold ETF (“Trust”) under NYSE Arca Rule 8.201-E (“Commodity-Based Trust Shares”). The proposed rule change was published for comment in the Federal Register on July 30, 2021.<sup>3</sup> On September 2, 2021, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.<sup>5</sup> The Commission has received no comments on the proposed rule change. The Commission is publishing this order to institute proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 92506 (July 26, 2021), 86 FR 41109.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 92867, 86 FR 50568 (September 9, 2021). The Commission designated October 28, 2021, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

## II. Description of the Proposed Rule Change<sup>7</sup>

The Exchange proposes to list and trade Shares of the Trust<sup>8</sup> under NYSE Arca Rule 8.201-E, which governs the listing and trading of Commodity-Based Trust Shares<sup>9</sup> on the Exchange. The Sponsor of the Trust is Sprott Asset Management LP, a Canadian limited partnership (“Sponsor”). The Bank of New York Mellon serves as the Trust’s administrator (“Administrator”) and transfer agent (“Transfer Agent”). The Delaware Trust Company is the trustee of the Trust (“Trustee”).<sup>10</sup> The Royal Canadian Mint is the custodian of the Trust’s gold (“Gold Custodian” or “Mint”).<sup>11</sup> The Bank of New York Mellon will also serve as the Trust’s

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<sup>7</sup> Additional information regarding the Trust and the Shares, including investment strategies, creation and redemption procedures, and portfolio holdings can be found in the Notice, supra note 3.

<sup>8</sup> On February 11, 2021, the Trust submitted to the Commission on a confidential basis its draft registration statement on Form S-1 under the Securities Act of 1933, and on July 1, 2021, the Trust submitted to the Commission the most recent amendment to its draft registration statement (collectively, the “Registration Statement”). The Registration Statement is not yet effective, and the Exchange will not commence trading in Shares until the Registration Statement becomes effective.

<sup>9</sup> Commodity-Based Trust Shares are securities issued by a trust that represent investors’ discrete identifiable and undivided beneficial ownership interest in the commodities deposited into the Trust. The Exchange represents that the Shares will satisfy the requirements of NYSE Arca Rule 8.201-E and thereby qualify for listing on the Exchange and that the Trust relies on the exemption contained in Rule 10A-3(c)(7) regarding the application of Rule 10A-3 (17 CFR 240.10A-3) under the Act.

<sup>10</sup> The Trustee is a fiduciary under the Trust Agreement and must satisfy the requirements of Section 3807 of the Delaware Statutory Trust Act. However, the fiduciary duties, responsibilities and liabilities of the Trustee are limited by, and are only those specifically set forth in, the Trust Agreement. The Trust does not have a Board of Directors or persons acting in a similar capacity.

<sup>11</sup> The Mint operates pursuant to the Royal Canadian Mint Act (Canada) and is a Canadian Crown corporation. Crown corporations are corporations wholly-owned by the Government of Canada. The Mint is, for all its purposes, an agent of Her Majesty in right of Canada and, as such, its obligations generally constitute unconditional obligations of the Government of Canada. The Gold Custodian is responsible for safekeeping the gold owned by the Trust pursuant to gold storage and custody agreements. The Gold Custodian will hold gold for the account of the Trust on an allocated basis (the “Trust Allocated Account”), except where gold is temporarily held in an unallocated account (the “Trust Unallocated Account”). The Sponsor may cause the Trust to engage unaffiliated gold brokers to transfer unallocated gold between the Trust’s custody accounts maintained for the benefit of the Trust by the Gold Custodian in Ottawa, Canada and London, United Kingdom where it can be delivered to a redeeming Authorized

cash custodian (“Cash Custodian”) pursuant to the terms of the agreement between the Trust and the Cash Custodian. In its capacity as cash custodian, the Cash Custodian will maintain a custodial account that holds cash for the benefit of the Trust for the purpose of payment of the Sponsor’s fee in cash or the other expenses of the Trust.

#### Operation of the Trust

The investment objective of the Trust will be for the Shares to reflect the performance of the price of gold, less the Trust’s expenses and liabilities. The Trust will issue Shares which represent units of fractional undivided beneficial interest in and ownership of the Trust.

The Trust’s assets are expected to consist primarily of fully allocated unencumbered physical gold bullion held by the Mint on behalf of the Trust that meets certain environmental, social and governance (“ESG”) standards and criteria established by the Sponsor (“ESG Approved Gold”), and will also include unallocated unencumbered physical gold bullion held by the Mint on behalf of the Trust and cash.

The Trust does not intend to hold a certain amount of gold in unallocated form to satisfy redemption requests or to pay expenses, but the Trust expects to hold some amount of unallocated gold at any given point in time. The Trust’s holdings of unallocated gold may be a significant percentage of the Trust’s assets if, for example, the Trust has received more requests for creations than redemptions or the Trust’s unallocated gold holdings are not sufficient to meet certain minimum size requirements to convert unallocated gold to ESG Approved Gold at the Mint. The Trust may need to instruct the Mint to convert ESG Approved Gold into unallocated gold if insufficient unallocated gold is available to be sold to pay expenses or to meet redemption

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Participant (as defined below) if additional unallocated gold is needed by the Trust to satisfy the redeeming Authorized Participant’s redemption request. The Gold Custodian is responsible for allocating specific bars of gold to the Trust Allocated Account. The Gold Custodian will provide the Trust with regular reports detailing the gold transfers in and out of the Trust Unallocated Account with the Gold Custodian and identifying the gold bars held in the Trust Allocated Account.

requests. The Mint will exchange ESG Approved Gold for an equal amount of unallocated gold upon the receipt of proper instructions from the Sponsor.

The ESG standards and criteria used by the Sponsor (the “ESG Criteria”) are designed to provide investors with an enhanced level of ESG scrutiny along with disclosure of the provenance of the metal sourced, and include an evaluation of mining companies and mines.<sup>12</sup> Mining companies and mines that meet the ESG Criteria (“ESG Approved Mining Companies” and “ESG Approved Mines”, respectively) must also comply with the Mint Responsible Sourcing Requirements. An overview of the Sponsor’s application of the ESG Criteria to mining companies and mines that can provide the material for ESG Approved Gold is provided below.<sup>13</sup>

The application of the ESG Criteria involves multiple levels of analysis. While the Sponsor’s evaluation of mines and mining companies will include the objective factors discussed below, the Sponsor will also evaluate company reports and, where possible, interview key personnel to assess whether such a mining company or mine meets the ESG Criteria, which will require the subjective judgment of the Sponsor. The selection of these factors and how they are applied will be based, at least to some degree, on the judgment of the Sponsor and may or may not be consistent with current or future standards used by others in the industry. The ESG Criteria is subject to change by the Sponsor in its sole discretion.

The ESG Criteria are in addition to those used in the London Bullion Market Association’s (“LBMA”) Responsible Sourcing Program, as detailed in the LBMA’s Responsible Gold Guidance, and are designed to provide investors with an enhanced level of

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<sup>12</sup> The ESG Criteria are anticipated to evolve over time at the discretion of the Sponsor. Also, one or more criterion may not be relevant with respect to all sources of gold that are eligible for investment. Factors that could be considered by the Sponsor in modifying the ESG Criteria include changes to current gold mining techniques or standards, evolving legal standards, the introduction of new standards or evaluation frameworks within the mining industry or the elimination of existing standards or frameworks that in the view of the Sponsor are relevant to the ESG assessment of a mining company or mine site.

<sup>13</sup> The ESG Criteria and the Sponsor’s application of the ESG Criteria are disclosed in the Registration Statement.

ESG scrutiny along with disclosure of the provenance of the metal sourced. The Mint currently requires that its refining customers, including mines, meet the requirements outlined in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, the LBMA Responsible Gold Guidance, the Mint's Responsible Metals Program and the Mint's Anti-Money Laundering and Anti-Terrorist Financing Program in compliance with the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (Canada) (collectively, the "Mint Responsible Sourcing Requirements"). Only mines which the Mint determines meet and maintain the Mint Responsible Sourcing Requirements and with whom the Mint has a contractual refining relationship (each a "Mint Approved Mine", collectively the "Mint Approved Mines") will be eligible for consideration by the Sponsor as a provider of ESG Approved Gold. The Mint will cease refining gold from any Mint Approved Mine that no longer meets the Mint Responsible Sourcing Requirements, as determined by the Mint from time to time.

The ESG factors used for the ESG assessment of mines and miners generally will encompass the following factors:

- Environmental Factors
  - Energy use and greenhouse gas emissions
  - Tailings and waste management
  - Conservation and water management
  - Mine site remediation
- Social Factors
  - Worker safety and health
  - Community relations
  - Natural resource benefit to local communities
  - Child and forced labor
- Governance Factors

- Corporate governance
- Workplace and gender diversity
- Fair executive compensation
- Corporate transparency and disclosures

Mining companies that qualify for the LBMA's Responsible Sourcing Program and are Mint Approved Mines will then be subject to two levels of ESG screening by the Sponsor: at the overall company level and at the individual mine site level.

First, the Sponsor will evaluate a mining company using ESG factors determined by the Sponsor (described above). This evaluation will use a number of tools, which include ratings from third-party research providers, such as Sustainalytics ESG Risk Ratings, along with sell-side equity research reports. With respect to corporate governance, the Sponsor will evaluate recommendations from proxy voting research providers, such as the Glass Lewis Proxy Review. The Sponsor will also use compliance with precious metals industry standards as an objective factor in its evaluation of mining companies. Each mining company with high ESG ratings and favorable recommendations from proxy voting research providers that complies with precious metals industry standards will be designated as an ESG Approved Mining Company.

Second, the Sponsor will evaluate individual mine site locations of each ESG Approved Mining Company. Each mine location of an ESG Approved Mining Company will then be evaluated by the Sponsor as follows: (1) the performance of each mine against various indicators in the Mining Association of Canada's Towards Sustainable Mining standards; (2) using the ESG factors described above; and (3) whether such mine is in a heightened risk or conflict area. Each mining location of that ESG Approved Mining Company that (a) the Sponsor determines to meet the Mining Association of Canada's Towards Sustainable Mining standards and the ESG factors, and (b) is not in a heightened risk or conflict area will be designated as an ESG Approved Mine. Only ESG Approved Mines will be permitted to supply the raw material for ESG Approved Gold to the Mint, which will then refine the raw material to create ESG

Approved Gold for the Trust. This means that the provenance of ESG Approved Gold will be known to the Trust.

Heightened risk or conflict areas include areas where:

- human rights abuses, forced or child labor, war crimes or genocide are prevalent;
- mines are involved in direct or indirect support to non-state actors that use arms without legal authority;
- mines transport gold or supplies along routes that involve payment of illegal taxes or extortions; and
- mines are involved in money laundering or terrorism financing.

The Sponsor will be responsible for any costs associated with researching, establishing and maintaining the ESG Criteria, assessing mining companies and mines against certain of the ESG Criteria and the diligence of the Trust's ESG Approved Gold Holdings. The Sponsor will conduct research on each mining company using its in-house investment professionals, and may use the services of outside consultants.

The Trust will not trade in gold futures, options or swap contracts on any futures exchange or over the counter ("OTC"). The Trust will not hold or trade in commodity futures contracts, "commodity interests," or any other instruments regulated by the Commodity Exchange Act. The Trust's Cash Custodian may hold cash temporarily received from the sale of gold. The Trust's assets will only consist of ESG Approved Gold, unallocated gold and cash.

#### Operation of the Gold Market

The global trade in gold consists of OTC transactions in spot, forwards, and options and other derivatives, together with exchange-traded futures and options. The ESG Criteria and the processes and methods for refining and using ESG Approved Gold for the Trust's operations have been developed by the Sponsor specifically for the Trust, and thus no ESG Approved Gold that meets the ESG Criteria has been produced. Therefore, there have been no market transactions in ESG Approved Gold. The Trust is not aware of a separate market for ESG

Approved Gold and does not believe that one will develop. ESG Approved Gold will be a subset of allocated gold bullion that is already currently refined by the Mint for its customers.

The OTC gold market includes spot, forward, and option and other derivative transactions conducted on a principal-to-principal basis. While this is a global, nearly 24-hour per day market, its main centers are London, New York, and Zurich.

According to the Exchange, most OTC market trades are cleared through London. The LBMA plays an important role in setting OTC gold trading industry standards. A London Good Delivery Bar (as described below), which is acceptable for settlement of any OTC transaction, will be acceptable for delivery to the Trust in connection with the issuance of Creation Units (defined below).

The most significant gold futures exchange in the U.S. is COMEX, operated by Commodities Exchange, Inc., a subsidiary of New York Mercantile Exchange, Inc., and a subsidiary of the Chicago Mercantile Exchange Group (the “CME Group”). Other commodity exchanges include the Tokyo Commodity Exchange (“TOCOM”), the Multi Commodity Exchange Of India (“MCX”), the Shanghai Futures Exchange, ICE Futures US (the “ICE”), and the Dubai Gold & Commodities Exchange. The CME Group and ICE are members of the Intermarket Surveillance Group (“ISG”).

#### The London Gold Bullion Market

According to the Exchange, most trading in physical gold is conducted on the OTC market, predominantly in London. LBMA coordinates various OTC-market activities, including clearing and vaulting, acts as the principal intermediary between physical gold market participants and the relevant regulators, promotes good trading practices and develops standard market documentation. In addition, the LBMA promotes refining standards for the gold market by maintaining the “London Good Delivery List,” which identifies refiners of gold that have been approved by the LBMA. In the OTC market, gold bars that meet the specifications for weight, dimensions, fineness (or purity), identifying marks (including the assay stamp of an



LBMA-acceptable refiner) and appearance described in “The Good Delivery Rules for Gold and Silver Bars” published by the LBMA are referred to as “London Good Delivery Bars.” A London Good Delivery Bar (typically called a “400 ounce bar”) must contain between 350 and 430 fine troy ounces of gold (1 troy ounce = 31.1034768 grams), with a minimum fineness (or purity) of 995 parts per 1000 (99.5%), be of good appearance and be easy to handle and stack. The fine gold content of a gold bar is calculated by multiplying the gross weight of the bar (expressed in units of 0.025 troy ounces) by the fineness of the bar. A London Good Delivery Bar must also bear the stamp of one of the refiners identified on the London Good Delivery List.

Following the enactment of the Financial Markets Act 2012, the Prudential Regulation Authority of the Bank of England is responsible for regulating most of the financial firms that are active in the bullion market, and the Financial Conduct Authority is responsible for consumer and competition issues. Trading in spot, forwards and wholesale deposits in the bullion market is subject to the Non-Investment Products (“NIPS”) Code adopted by market participants.

#### Creation and Redemption of Shares

The Trust will create and redeem Shares on a continuous basis in one or more blocks of 25,000 Shares (a block of 25,000 Shares is called a “Creation Unit”). As described below, the Trust will issue Shares in Creation Units to certain authorized participants (“Authorized Participants”) on an ongoing basis.

Creation Units may be created or redeemed only by Authorized Participants. Orders must be placed by 3:59 p.m. Eastern Time (“E.T.”). The day on which a Trust receives a valid purchase or redemption order is the order date. In connection with creations and redemptions of Creation Units, Authorized Participants will be required to deliver or receive unallocated gold to or from the Trust, as applicable. An Authorized Participant will be required to enter into a trading agreement with the Mint for purposes of facilitating transfers of unallocated gold between the Trust and the Authorized Participant.

Unallocated gold received from Authorized Participants will be converted into ESG Approved Gold by the Mint. The Mint will convert unallocated gold into ESG Approved Gold after receipt of a completed withdrawal request form from the Sponsor to withdraw an amount of unallocated gold from the Trust Unallocated Account and deposit ESG Approved Gold into the Trust Allocated Account.

The Trust will redeem Shares using unallocated gold. To the extent that the Trust's existing holdings of unallocated gold are insufficient to meet a redemption request, the Trust will be required to request that the Mint convert ESG Approved Gold to unallocated gold, which may result in delays in the Trust's ability to meet redemption requests from Authorized Participants. The Mint will exchange ESG Approved Gold for an equal amount of unallocated gold upon the receipt of proper instructions from the Sponsor. The Mint will issue a confirmation of a completed exchange to the Sponsor by facsimile or by e-mail on the business day that the exchange is completed.

The Mint expects that it will be able to refine and produce ESG Approved Gold within approximately five business days following the receipt of completed withdrawal request, subject to production capacity, availability and minimum size requirements. The business day on which the physical withdrawal is to occur will be confirmed to the Sponsor in writing by the Mint. A receipt of deposit will be issued to the Sponsor by facsimile or by e-mail on the business day the production of all ESG Approved Gold underlying a withdrawal request form is completed.

Creation Units are only issued or redeemed on a day that the Exchange is open for regular trading in an amount of gold determined by the Administrator. Because ESG Approved Gold can be sourced by the Mint only from a limited number of suppliers, from time-to-time, on a temporary basis until additional ESG Approved Gold can be refined by the Mint, the Trust will hold gold in unallocated form. No Shares will be issued unless the Mint has allocated to the Trust Unallocated Account the corresponding amount of unallocated gold from the Authorized Participant's account.

Each Authorized Participant must be a registered broker-dealer, a participant in Depository Trust Corporation (“DTC”), have entered into an agreement with the Trustee (the “Authorized Participant Agreement”) and be in a position to deliver or receive to or from the Trust, as applicable, an amount of gold that is at least equal to the aggregate NAV of the number of Creation Units that are part of a purchase order or redemption order, as the case may be.

According to the Registration Statement, Authorized Participants may surrender Creation Units in exchange for the corresponding amount of unallocated gold announced by the Transfer Agent. Upon the surrender of such Shares and the payment of the Transfer Agent’s applicable fee and of any expenses, taxes or charges, the Transfer Agent will deliver to the order of the redeeming Authorized Participant the amount of unallocated gold corresponding to the redeemed Creation Units. Shares can only be surrendered for redemption in Creation Units of 25,000 Shares each.

Before surrendering Creation Units for redemption, an Authorized Participant must deliver to the Trustee a written request indicating the number of Creation Units it intends to redeem. The date the Trustee receives that order determines the amount of unallocated gold to be received in exchange. However, orders received by the Trustee after 3:59 p.m. Eastern Time (“E.T.”) will be rejected.

The redemption distribution from the Trust will consist of a credit to the redeeming Authorized Participant’s unallocated account representing the amount of the gold held by the Trust evidenced by the Shares being redeemed as of the date of the redemption order.

#### Net Asset Value

The NAV of the Trust will be calculated by subtracting the Trust’s expenses and liabilities on any day from the value of the gold and other assets owned by the Trust on that day; the NAV per Share will be obtained by dividing the NAV of the Trust on a given day by the number of Shares outstanding on that day. On each day on which the Exchange is open for regular trading, the Administrator will determine the NAV as promptly as practicable after

4:00 p.m. E.T. The Administrator will value the Trust's gold on the basis of LBMA Gold Price PM or LBMA Gold Price AM. If the Sponsor deems it necessary, the Sponsor and the Administrator may agree to use a widely recognized pricing service for purposes of ascertaining the price of gold to use when calculating the NAV. The NAV per Share will be calculated by taking the current price of the Trust's total assets, subtracting any liabilities, and dividing by the total number of Shares outstanding.

Authorized Participants will not receive from the Sponsor, the Trust or any affiliates any fee or other compensation in connection with the offering of the Shares.

#### Availability of Information Regarding Gold

Currently, the Consolidated Tape Plan does not provide for dissemination of the spot price of a commodity such as gold over the Consolidated Tape. However, there will be disseminated over the Consolidated Tape the last sale price for the Shares, as is the case for all equity securities traded on the Exchange (including exchange-traded funds). In addition, there is a considerable amount of information about gold and gold markets available on public websites and through professional and subscription services.

Investors may obtain gold pricing information on a 24-hour basis based on the spot price for an ounce of Gold from various financial information service providers, such as Reuters and Bloomberg.

Reuters and Bloomberg, for example, provide at no charge on their websites delayed information regarding the spot price of Gold and last sale prices of Gold futures, as well as information about news and developments in the gold market. Reuters and Bloomberg also offer a professional service to subscribers for a fee that provides information on Gold prices directly from market participants. Complete real-time data for Gold futures and options prices traded on the COMEX are available by subscription from Reuters and Bloomberg. There are a variety of other public websites providing information on gold, ranging from those specializing in precious

metals to sites maintained by major newspapers. In addition, the LBMA Gold Price is publicly available at no charge at [www.lbma.org.uk](http://www.lbma.org.uk).

#### Availability of Information

The intraday indicative value (“IIV”) per Share for the Shares will be disseminated by one or more major market data vendors. The IIV will be calculated based on the amount of gold held by the Trust and a price of gold derived from updated bids and offers indicative of the spot price of gold.<sup>14</sup>

The website for the Trust (<https://sprott.com/investment-strategies/physical-bullion-trusts>) will contain the following information, on a per Share basis, for the Trust: (a) the mid-point of the bid-ask price<sup>15</sup> at the close of trading (“Bid/Ask Price”), and a calculation of the premium or discount of such price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. The website for the Trust will also provide the Trust's prospectus. Finally, the Trust's website will be updated once daily to provide the last sale price of the Shares as traded in the U.S. market at the end of regular trading. In addition, information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

The Trust will maintain on its website current lists of the ESG Criteria and ESG Approved Mines and ESG Approved Mining Companies from which the Trust sources its ESG Approved Gold. The Trust anticipates that ESG Approved Mines and ESG Approved Mining Companies may be added or removed from such lists over time based on, among other things,

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<sup>14</sup> The IIV on a per Share basis disseminated during the Core Trading Session should not be viewed as a real-time update of the NAV, which is calculated once a day.

<sup>15</sup> The bid-ask price of the Shares will be determined using the highest bid and lowest offer on the Consolidated Tape as of the time of calculation of the closing day NAV.

whether such ESG Approved Mines and ESG Approved Mining Companies meet the evolving ESG Criteria and whether they are Mint Approved Mines. The Trust will update the information on its website promptly after any change to the ESG Criteria, ESG Approved Mines or ESG Approved Mining Companies.

#### Criteria for Initial and Continued Listing

The Trust will be subject to the criteria in NYSE Arca Rule 8.201-E(e) for initial and continued listing of the Shares.

A minimum of two Creation Units or 50,000 Shares will be required to be outstanding at the start of trading, which is equivalent to 10,000 fine ounces of gold or about \$18,550,000 as of June 14, 2021. The Exchange believes that the anticipated minimum number of Shares outstanding at the start of trading is sufficient to provide adequate market liquidity.

#### Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Trust subject to the Exchange's existing rules governing the trading of equity securities. Trading in the Shares on the Exchange will occur in accordance with NYSE Arca Rule 7.34-E(a). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6-E, Commentary .03, the minimum price variation ("MPV") for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is \$0.01, with the exception of securities that are priced less than \$1.00 for which the MPV for order entry is \$0.0001.

Further, NYSE Arca Rule 8.201-E sets forth certain restrictions on ETP Holders acting as registered Market Makers in the Shares to facilitate surveillance. Under NYSE Arca Rule 8.201-E(g), an ETP Holder acting as a registered Market Maker in the Shares is required to provide the Exchange with information relating to its trading in the underlying gold, any related futures or options on futures, or any other related derivatives. Commentary .04 of NYSE Arca Rule 6.3-E requires an ETP Holder acting as a registered Market Maker, and its affiliates, in the Shares to

establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of any material nonpublic information with respect to such products, any components of the related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments (including the Shares).

As a general matter, the Exchange has regulatory jurisdiction over its ETP Holders and their associated persons, which include any person or entity controlling an ETP Holder. To the extent the Exchange may be found to lack jurisdiction over a subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts, the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading on the Exchange in the Shares may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which conditions in the underlying gold market have caused disruptions and/or lack of trading, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in Shares will be subject to trading halts caused by extraordinary market volatility pursuant to the Exchange's "circuit breaker" rule.<sup>16</sup> The Exchange will halt trading in the Shares if the NAV of the Trust is not calculated or disseminated daily. The Exchange may halt trading during the day in which an interruption occurs to the dissemination of the IIV, as described above. If the interruption to the dissemination of the IIV persists past the trading day in which it occurs, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

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<sup>16</sup> See NYSE Arca Rule 7.12-E.

## Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by the Financial Industry Regulatory Authority (“FINRA”) on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.<sup>17</sup> The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.<sup>18</sup>

Also, pursuant to NYSE Arca Rule 8.201-E(g), the Exchange is able to obtain information regarding trading in the Shares and the underlying gold through ETP Holders acting

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<sup>17</sup> FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA’s performance under this regulatory services agreement.

<sup>18</sup> For a list of the current members of ISG, see [www.isgportal.org](http://www.isgportal.org).



as registered Market Makers, in connection with such ETP Holders' proprietary or customer trades through ETP Holders which they effect on any relevant market.

In addition, the Exchange also has a general policy prohibiting the improper distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares of the Trust on the Exchange.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5-E(m).

III. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2021-65 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>19</sup> to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>20</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow

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<sup>19</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>20</sup> Id.

for additional analysis of the proposal’s consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,” and “to protect investors and the public interest.”<sup>21</sup>

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”<sup>22</sup> The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,<sup>23</sup> and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.<sup>24</sup>

The Commission is concerned that certain aspects of the proposal are not sufficiently described and that the Exchange has not met its burden to demonstrate that the proposed rule change is consistent with the Act and the rules and regulations issued thereunder. For example, with respect to creation and redemption of Shares, the Exchange describes a process whereby the Mint will convert unallocated gold into ESG Approved Gold or convert ESG Approved Gold into unallocated gold.<sup>25</sup> However, the Exchange does not explain how this conversion process will take place or provide sufficient details on how costly it will be for the Mint to perform such a conversion on the Fund’s behalf and the extent to which these costs will be borne by investors in the Shares. The Exchange also does not explain why this conversion from unallocated gold to ESG Approved Gold is necessary rather than allowing Authorized Participants to submit

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<sup>21</sup> 15 U.S.C. 78f(b)(5).

<sup>22</sup> 17 CFR 201.700(b)(3).

<sup>23</sup> See id.

<sup>24</sup> See id.

<sup>25</sup> See Notice, supra note 3.

Creation Units of ESG Approved Gold that they have sourced from the Mint. In addition, the Exchange states that to the extent that the Trust's existing holdings of unallocated gold are insufficient to meet a redemption request, the Trust will be required to request that the Mint convert ESG Approved Gold to unallocated gold, which may result in delays in the Trust's ability to meet redemption requests from Authorized Participants. However, the Exchange does not sufficiently explain why such a conversion is necessary to effect redemptions instead of the Fund redeeming Shares using ESG Approved Gold without a delay, or why this delay does not raise concerns under the Act.<sup>26</sup> As such, the Commission has concerns about the proposed conversion process and whether the proposal is sufficiently designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest, as required by Section 6(b)(5) of the Act.

Furthermore, the Commission is concerned that the Exchange does not adequately explain how other aspects of the proposal are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest, as required by Section 6(b)(5) of the Act. For example, the Exchange represents that the Administrator will value the Trust's gold, including both ESG Approved Gold and unallocated gold held by the Trust, based on LBMA Gold Price PM or LBMA Gold Price AM.<sup>27</sup> The Exchange further states that the Trust is not aware of a separate market for ESG Approved Gold and does not believe that one will develop.<sup>28</sup> However, given that ESG Approved Gold may constitute, by construction, a small portion of the total gold outstanding in the market, the Exchange has not sufficiently explained why the Trust can expect to trade or value ESG Approved Gold at the same price as unallocated gold. In addition, the proposal does not address the potential effects that the listing and trading of the Shares may have on the

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<sup>26</sup> See Notice, supra note 3.

<sup>27</sup> See id.

<sup>28</sup> See id.

development of a separate market for ESG Approved Gold or differential pricing terms for ESG Approved Gold in existing gold markets. The proposal also does not address the effect such a differential may have on the valuation of the Shares, potential pricing dislocations between the NAV per Share and Share price or between the NAV and the true value of the underlying assets, or how such dislocations might affect investors in the Shares, nor how those effects would be consistent with the Act.

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>29</sup> to determine whether the proposal should be approved or disapproved.

#### IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>30</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other

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<sup>29</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>30</sup> Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal in addition to any other comments they may wish to submit about the proposed rule change. In this regard, the Commission seeks commenters' views regarding the Exchange's proposal to list and trade the Shares is adequately designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest, consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2021-65 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2021-65. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F

Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2021-65 and should be submitted by [insert date 21 days from publication in the Federal Register].

Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>31</sup>

J. Matthew DeLesDernier,  
Assistant Secretary.

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<sup>31</sup> 17 CFR 200.30-3(a)(57).